

For Publication

FILED

UNITED STATES COURT OF APPEALS

JAN 13 1984

FOR THE NINTH CIRCUIT

PHILLIP B. WINBERRY
CLERK, US COURT OF APPEALS

QUECHAN INDIAN TRIBE,

No. 82-7651

Petitioner,

v.

UNITED STATES
DEPARTMENT OF LABOR,

O P I N I O N

Respondent.

Appeal from a Final Decision of the United
States Secretary of Labor

Argued and Submitted: June 14, 1983

Before: KENNEDY and BOOCHEVER, Circuit Judges, and
GILLIAM, * District Judge

GILLIAM, District Judge:

Quechan Indian Tribe (Quechan) petitions for review of a
final order by the Secretary of Labor requiring repayment of
\$197,452 in CETA grant funds, due to Quechan's failure to
comply with CETA regulations. We remand.

*Honorable Earl B. Gilliam, United States District Judge
for the Southern District of California, sitting by
designation.

BACKGROUND

Quechan, as a prime sponsor under the Comprehensive Education and Training Act of 1973 (CETA), received three grants to carry out CETA programs under Titles I, III and IV of the Act. The grants, totalling \$245,380, were paid between December 1974 and April 1976.

The Department of Labor (DOL), on February 11, 1976, notified Quechan that it was in violation of CETA regulations, because it had failed to submit required reports over a fifteen-month period for the three CETA grants. DOL requested that Quechan submit these reports. Despite numerous meetings between DOL officials and Quechan, no reports were received by DOL.

An audit of Quechan's grant expenditures was begun in January 1976 by independent accountants retained by DOL. Many expenditures were questioned by the auditors because of, inter alia, lack of proof of the participants' eligibility to receive CETA funds. The auditors found that the records of the third grant were unauditible, and that the tribe had failed to reconstruct its records.

Based on these audit reports, a DOL grant officer disallowed costs of \$196,452. DOL issued its final determination on August 5, 1980, requiring repayment by Quechan of \$197,452. Quechan requested a hearing before an Administrative Law Judge (ALJ) pursuant to 20 C.F.R. §676.88. The hearing was held on May 22, 1981.^{1/}

1 On August 10, 1982, the **ALJ** issued his decision that the
2 **costs** were properly disallowed, and ordered Quechan to repay
3 **\$197,452**. The Secretary of Labor declined to review the **ALJ's**
4 decision, which then became the final decision of the
5 Secretary. It is from this decision that Quechan petitions
6 for review.^{2/}

7 ISSUES

8 1. Did Quechan bear the burden of proving that **CETA**
9 funds were expended in accordance with CETA regulations?

10 2. Was the **Secretary's** decision that the costs were
11 properly disallowed supported by substantial evidence?^{3/}

12 DISCUSSION

13 1. The **burden** of proof.

14 The ALJ relied on 20 C.F.R. **§676.89(b)** in assigning the
15 burden of **proof** to Quechan.^{4/} Quechan argues, first, **that** the
16 regulations contained in 29 **C.F.R.** Part 97, Subpart B, should
17 have been *applied, rather than the general regulations in 20
18 **C.F.R.** Part 676, Subpart F. The regulations in 29 **C.F.** R. Part
19 97, Subpart B are applicable to Title III CETA programs, and
20 relate specifically to Indian Employment and Training
21 **Programs.**

22 **The regulations** in 29 C.F.R. Part 97, **Subpart B** do not
23 expressly provide for the allocation of the burden of proof.
24 They state that, if the provisions of Subpart B conflict with
25 other regulations under CETA, Subpart B shall prevail with
26 respect to Title III programs. 29 C.F.R. **§97.102(a)**.

1 However , subsequent to the adoption of 29 C.F.R. **§97.102(a)**,
2 **DOL** adopted new regulations which stated that, for **Indian** and
3 Native American **programs**, "(t)he regulations on complaints,
4 investigations, and sanctions **shall** be as described in 20
5 **C.F.R.** 676.81 through **676.93.**" '20 **C.F.R** S688.146; 44 Fed,
6 Reg. 64343 (1979). **DOL** also adopted-29 C.F.R. **§97.102(c)** in
7 1979. This section states in pertinent **part**:

8 The regulations in this part govern programs funded
9 under the Comprehensive Employment and Training Act
10 of 1973 prior to amendment and reauthorization in 1978
11 (Pub. **L. 95-524**, 92 **Stat.1909**), and are thus in many
12 particulars superseded by regulations implementing
the reauthorized Comprehensive Employment and Train-
ing Act, **Pub.Law 95-524**, 92 Stat.1909, which are being
codified at 20 **C.F.R.** Parts **675 et seq.**

13 29 C.F.R. **§97.102(c)** (1979).

14 20 C.F.R. **§676.89(b)** was thus made applicable to Title
15 III programs, and, since 29 **C.F.R.** Part 97, Subpart B **is**
16 silent on the issue of the allocation of the burden of proof,
17 there is no direct **conflict** between it and 20 C.F.R.
18 **§676.89(b)**, and the **ALJ** correctly relied on the provisions of
19 20 C.F.R. **§676.89(b)** to assign the burden of proof to
20 **Quechan.**^{5/}

21 Quechan argues next that, even if the Title III
22 regulations did not apply, 20 C.F.R. **§676.89(b)** and other
23 Subpart **F** hearing regulations were not published in the 1981
24 edition of the Code of Federal Regulations, and thus must have
25 been repealed at the time of the 1981 hearing.

26 Title 20 of the 1981 **C.F.R.** did in deed delete Subpart **F**

and noted that part as "[Reserved]". However, DOL is required to publish currently its regulations in the federal register. 5 U.S.C. §552(a)(1). Prior to the 1981 hearing, DOL announced in the Federal Register that, until such time as revised Subpart F regulations were adopted, "the requirements of 20 C.F.R. Part 676, Subpart F, as published on April 3, 1979, remain in effect." 45 Fed. Reg. 33846 (1980). Quechan therefore had adequate notice that the Subpart F regulations of 20 C.F.R. Part 676 were in effect at the time of the hearing. See United States v. Tijerina, 407 F.2d 349, 354 (10th Cir.), cert. denied, 396 U.S. 843 (1969).

2. The Secretary's Decision.

The limits of our review of the Secretary's decision are set forth in the CETA:

A. Standard of Review;

The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may, in whole or in part, set aside the findings of the Secretary or remand the case. . . to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the previous action, and shall certify to the court the record of the further proceedings.

29. U.S.C. §817 (Supp. II 1978). (repealed Pub, L 97-300, Title I, §184[a], 96 Stat. 1357 [1982]).

B. Substantial Evidence.

DOL's administrative file included the detailed report of the independent audit, and indicated Quechan's lack of compliance with the report requirements,

1 Quechan relied primarily on evidence of a 67% unemploy-
2 ment rate at the reservation to establish the participants'
3 eligibility. Mr. Albert O'Brien, Jr., the first Quechan **CETA**
4 director, testified that, because the reservation is very
5 small, he **knew** when applicants were unemployed: **Quechan**
6 prepared quarterly status summaries, some **of** which were not
7 dated, and some were neither signed nor dated. These indicate
8 the participants were unemployed.

9 Out of about 100 participants in all three grants, at
10 least 52 were **funded** by the Title III grant. Economically
11 disadvantaged, unemployed, **or** underemployed Indian **or** Native
12 Americans may participate in Title III grants, so long as they
13 reside **within** the area covered by the **prime** sponsor's plan.
14 **29 C.F.R. §97.132(a) (1).** We believe that, at least with
15 respect to Title III applicants, it is logical to infer that
16 the participants were in fact eligible, because, even if **they**
17 had other employment, the fact that they were economically
18 disadvantaged or underemployed would still make them eligible
19 to participate in the **CETA** grant.

20 With respect to the disallowed costs, Quechan offered
21 conflicting testimony as to **whether reports** had once been kept
22 but subsequently lost. Mr. O'Brien, Jr. testified that,
23 initially, he **reported** by telephone to a DOL employee whose
24 name he could not remember. There **were** apparently some visits
25 to the reservation by DOL personnel, but it appears that, for
26 almost ten months after Quechan began participating in the

1 CETA grants, nothing was said about the lack of reports. In a
2 letter dated September 2, 1975 to grant recipients, DOL
3 emphasized the need to comply with reporting requirements.
4 Significantly too, in September 1975 Grant No. -87, which was
5 to run from 1 July 1975 to 30 June 1976, was amended by
6 additional funding under all three Titles.

7 The ALJ noted that the present grant officer disclaimed
8 any charge of fraud.' However, the ALJ concluded that, while
9 Quechan had shown that it had spent the grant funds on the
10 programs for which they were intended, Quechan had failed to
11 meet its burden of proving that certain specified adminis-
12 trative expenditures were made in furtherance of the grants'
13 purposes, and also that program participants met the condition.
14 of eligibility.

15 It appears from the record before us that Quechan failed
16 to meet its burden of showing that it complied with the
17 requirements of 29 C.F.R. SS96.25, 97.132, 97.167(a),
18 99.42(c) (1) and -97.161. However, there is no indication that
19 the ALJ considered the equities in this case in arriving at
20 his decision and order of repayment.

21 The Secretary has authority to waive DOL's right to
22 recoupment. 29 U.S.C. §816 (Supp. II 1978) (Repealed Pub. L.
23 97-300, Title I, §184[a], 96 Stat. 1357 [1982]). We therefore
24 remand to the Secretary to consider all the equities in making
25 an explicit determination whether the sanction of repayment of
26 almost four-fifths of the grants' total is warranted. 6/ The

1 factors that are to be considered in the Secretary's decision
2 **are:** 1) Quechan failed to fulfill important statutory and
3 regulatory duties: 2) Quechan was not advised until September
4 1975 that it was in violation of **CETA** regulations, some ten
5 months after Quechan began participating in the **CETA** grants;
6 3) the additional funding amendment **in September 1975**; 4) the
7 extremely high unemployment rate on the reservation; 5) the
8 grant officer's disclaimer of any charges of fraud; and
9 6) the **ALJ's** conclusion that Quechan had spent the grant funds
10 on the programs for which they were intended.

11 Remanded.
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FOOTNOTES

1/ . Quechan concedes that \$22,884 of its CETA grant monies were properly disallowed as unallowable excess administrative costs, and that \$2,388 were properly disallowed as unallowable tax penalties.

2/ 29 U.S.C.A. §817(a), under which this court had jurisdiction to review the Secretary's final order, was repealed on October 13, 1982, some two weeks before Quechan filed its petition for review. See Pub.L. No. 97-300, Title I, §814(a)(1), 96 Stat. 1357 (1982). However, under the transitional provision of the Job Training Partnership Act, 29 U.S.C.A. §1591(e), this court has statutory authority to exercise jurisdiction over proceedings begun between October 13, 1982 and September 30, 1984 under CETA. See Pub.L. No. 97-300, Title I, §181(e), 96 Stat. 1355 (1982).

3/ We do not reach the question of whether the Secretary is authorized to demand repayment of CETA funds expended without proper auditing and bookkeeping procedures because Quechan did not preserve that issue for appeal by its failure to raise it at the administrative level. Inter-Tribal Council of Nevada v. Department of Labor, 701 F.2d 770 (9th Cir. 1983).

4/ The party requesting the hearing shall have the burden of establishing the facts and the entitlement to the relief requested. 20 C.F.R. §676.89(b), now 20 C.F.R. §676.90(b).

5/ The disallowed costs were not exclusively earmarked for Title III programs, but the regulations in 20 C.F.R. Part 676 were made explicitly applicable to Title II and Title IV programs in 1979. 44 Fed. Reg. 19990 et seq. (1979).

6/ Except for \$25,272, which Quechan concedes were properly disallowed.